

Office of Chief Counsel
Internal Revenue Service

memorandum

CC:LM:MCT:CIN: [REDACTED]

JEKagy

date:

to: Chief, Examination Division, Ohio District
Christina Wolfe

from: Associate Area Counsel, (LMSB) Cincinnati

subject:

[REDACTED]
Claim for Refund

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The purpose of this memorandum is to respond to questions raised during our [REDACTED] meeting regarding the taxpayer referenced above. As was described to us, the audit of the [REDACTED] is about to close as an agreed case. During the audit process, the agent had disallowed approximately \$ [REDACTED] in losses, and generated an amount of alternative minimum tax (AMT). Also during the audit, the taxpayer filed documents seeking to increase its NOL carryforward from the years under audit and earlier years. By the filing of the papers, the taxpayer was not seeking a refund, but instead was simply filing what it considered "protective claims" for the increased losses.

One of the claims was allowed, in part, based upon an FSA which sided with the taxpayer's interpretation of an ordering rule for computing NOLs, which rule was peculiar to [REDACTED] companies. The other claim dealt with an issue which is currently in litigation by another [REDACTED] company. The issue concerns the ability of a taxpayer to establish a useful life and to amortize certain intangibles. The second issue arises not only in the years under audit, but in earlier years now closed by statute. The taxpayer has already submitted its useful life study to Examination, but the claim either will be withdrawn or will be denied based on the Service's legal position that the assets at issue, even if properly shown to have a useful life, separate and distinct from goodwill and going concern, can't be partially abandoned.

ISSUES:

1. Whether the taxpayer, if it withdraws its current claim, is free to file a new claim in the future, even if the new claim raises essentially the withdrawn issue.

2. Whether the taxpayer is precluded from raising a claim to increase its NOL where the increased loss arises from one or more tax years for which the statutes of limitations are barred.

CONCLUSIONS:

1. Nothing in sections 6402 and 6511, which set forth the requirements which must be met to file a valid claim for refund or credit, prohibits the refiling of a withdrawn claim so long as the refiled claim is timely.

2. A taxpayer is not precluded from claiming a net operating loss (NOL) arising from a barred year. Section 172 provides for the calculation of an NOL and permits the carryback and the carryover of NOLs. With regard to an NOL deduction made up entirely of carryovers from prior loss years, the relevant year for statute of limitations purposes is the year in which the deduction is taken, not the loss year. Thus, for purposes of an NOL carryover, the fact that the loss year is closed is irrelevant.

ANALYSIS:

Both issues may be resolved as part of the same overall analysis. Section 6511(a) provides that a claim for credit or refund of an overpayment of any tax in respect of which the taxpayer is required to file a return shall be filed by the taxpayer within 3 years from the time the return was filed or 2

years from the time the tax was paid, whichever of those periods expires the later¹ or, if no return was filed by the taxpayer, within 2 years from the time the tax was paid. Section 6511(b)(1) provides that no credit or refund shall be allowed or made after the expiration of the period of limitation prescribed in subsection (a) for the filing of a claim for credit or refund, unless a claim for credit or refund is filed by the taxpayer within such period. However, any written agreement executed under section 6501(c)(4) extending the period of limitations on assessment with regard to such period will also extend the period for filing claims for credit or refund with respect to the same period.

In order to be a valid claim for refund, the claim must set forth in detail each ground upon which a credit or refund is claimed and facts sufficient to apprise the Commissioner of the exact basis thereof. See Treas. Reg. § 301.6402-2(b)(1). Further, a taxpayer must file a separate claim covering each tax period for which the taxpayer requests a refund. See Treas. Reg. § 301.6402-2(d).

Despite the requirements set forth in I.R.C. § 6402 and Treas. Reg. § 301.6402-2, a document which fails to meet those requirements may, nevertheless, be considered an informal claim. The Service describes an informal claim as a "letter or other document which contains all facts necessary to determine that a reduction in tax liability is involved ..." IRM § 4144.12(b). The informal claim doctrine allows the Commissioner to waive the requirements of the Treasury regulations governing claims for refund. United States v. Kales, 314 U.S. 186 (1941).²

Section 172(b)(2) of the Code provides, in general, that the entire amount of the net operating loss for any taxable year (the loss year) shall be carried to the earliest taxable year to which such loss may be carried (by reason of section 172(b)(1)). The portion of such loss which shall be carried to each of the other taxable years is the excess, if any, of the amount of such loss over the sum of the taxable income for each of the prior taxable years to which such loss may be carried. In this instance, the

¹ A special provision exists if the taxpayer executes an agreement to extend the period of limitations on assessment. See section 6511(c).

² To the extent you wish to determine whether the taxpayer's written submission should be considered a valid "claim," see G.C.M. 38786 (August 13, 1981), which discusses the minimum requirements for a valid claim as set forth in Treas. Reg. § 301.6402-(b)(1).

losses in dispute arose in years which followed three consecutive loss years. Thus, the losses in dispute could not be carried back and the issue is strictly confined to the concept of carryovers or carryforwards.

In determining the amount of a net operating loss that may be carried from a closed year forward to an open year, since the net operating loss for the closed year is based upon items arising in the closed year, all adjustments to taxable income, whether or not barred by the statute of limitations, will be taken into account and the amount of net operating loss carryover will be determined under the rules of section 172 of the Code.³ See Rev. Rul. 56-285, 1956-1 C.B. 134, (the fact that the statutory period for assessment of income taxes for the year in which a loss was sustained has expired does not preclude the Service from making such adjustments as may be necessary to correct the net operating loss deduction). See also Rev. Rul. 81-88, 1981-1 C.B. 85 (in determining the amount of a net operating loss that may be carried from a closed year forward to an open year, all adjustments to taxable income, whether or not barred by the statute of limitations, will be taken into account).

In that regard, section 172(a) provides that there shall be allowed as a deduction for the taxable year an amount equal to the aggregate of (1) the net operating loss carryovers to such year, plus (2) the net operating loss carrybacks to such year.

In general, section 172 provides for the use in one tax year of net operating losses sustained in prior or subsequent years. The statute accomplished this in steps involving three distinct defined terms: "net operating loss," "net operating loss carryover (or carryback)," and "net operating loss deduction."

The three steps in computing a net operating loss deduction for a year are described in Treas. Reg. § 1.172-1(b) (references to carrybacks are ignored hereinafter as irrelevant):

(1) Compute the net operating loss for any preceding taxable year from which a net operating loss may be carried over to such taxable year.

(2) Compute the net operating loss carryovers to such taxable year from such preceding taxable years.

³ Where only carry forwards are at issue, the special rules of Treas. Reg. § 301.6511(d)-2(a)(3) do not apply.

(3) Add such net operating loss carryovers in order to determine the net operating loss deduction for such taxable year.

The second of these steps involves: (1) determining the years to which an NOL may be carried under section 172(b)(1); and, (2) determining the amount of the NOL which has been "absorbed" in prior, "intervening" years under section 172(b)(2). See Treas. Reg. § 1.172-4(a)(3). Although NOL carryovers from multiple years are added together for purposes of the third step, determining the net operating loss deduction, carryovers from multiple loss years are treated separately in the second step -- in terms of both how far each NOL may be carried and how much of each NOL is absorbed in prior years.

Although determining the deduction under section 172 involves looking into the loss year, under step one, and into any intervening years, under step two, there is no tax impact for those years. The effect of the NOL is felt in the year to which it is carried over (or carried back) and taken as a net operating loss deduction, under step three.

Thus, when an NOL deduction is made up entirely of carryovers from prior loss years, the relevant year for statute of limitations purposes is the year in which the deduction is eventually taken, not the loss years. In other words, no separate statute extension is necessary regarding the loss year or years so long as the statute of limitations is open for the year to which the loss is carried.

As a result of the foregoing, as long as the relevant statute of limitations is open, and the other requirements for filing a claim for credit or refund are met, the claim may be filed. Whether the claim was filed and withdrawn one or more times is not, as a rule, determinative.⁴ Nothing in the relevant statutes precludes an otherwise valid claim from being filed based simply on the fact that the claim had been previously filed and withdrawn.

We hope that the foregoing addresses and disposes of all of the questions raised during our [REDACTED] meeting, but if

⁴ Obviously, a judgment on the merits for a particular tax year bars any subsequent proceedings for the same tax year. Commissioner v. Sunnen, 333 U.S. 591 (1948). Moreover, if a party does not raise a claim or a defense in the first suit, the party is deemed to waive the right to raise that claim in a later suit. United States v. Shanbaum, 10 F.3d 305 (5th Cir. 1994).

additional questions still remain or if new questions have arisen, please contact the undersigned at (513) 684-3211.

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